IN THE HIGH COURT OF UTTARANCHAL,
AT NAINITAL.
Second Appeal No. 990/ 2001
(Old No. 1955/1977)

1- Smt. Shahjahan Begum W/o Abdul Bari.
R/o Karkhana Bazar Almora (since deceased).
1/1. Abdul Bari
½. Mohd. Naseem S/o Abdul Bari
1/3. Mohd. Fahim S/o Abdul Bari
¼. Mohd. Nadeem S/o Abdul Bari
1/5. Smt. Tasneem S/o Abdul Bari
1/6. Smt. Musarrat Jahan D/o Abdul Bari
1/7. Smt. Ishrrat Jahan D/o Abdul Bari
All R/o Karkhana Bazar, District Almora.
2(a). Km. Agra
(b). Km. Ashya
(c) Km. Guddi
Daughters of late Smt. Roshan Jahan Begum
Through Smt. Shahjahan Begum as next
Friend.
(3) Abdul Mahan S/o Abdul Rahman.
(4) Smt. Azmat W/o Rahmat Ali,
(5) Smt. Fahmida W/o Asharat Ali,
(6) Smt. Tahira W/o Asalam Khan
(7) Smt. Sheeida W/o Nabi Bux.
(8) Smt. Zinat Jahan W/o Taslim Ahmad.
Through Shahjahan Begum No.1.
(9) Km. Shakila D/o Abdul Rahman
Through Shahjahan Begum no.1
Residents of Niyazganj,
Almora ……Plaintiffs/appellants.

Vs.

1/1. Smt. Rafiquan W/o Sri Saiffula,
½. Abrar Ahmad S/o Saiffulla
1/3. Qamar Ali S/o Saifullah
2- Sanaullah son of Azmatullah
R/o Mohalla Niyazganj,
Almora ……..Defendants-Respondents.

Sri Ishtiaq Ahmad khan, counsel for the appellants.
Sri V.K. Bisht, learned Senior Advocate for the respondents.

(Hon'ble B.C. Kandpal, J.)

This Second Appeal, U/S 100 C.P.C., has been preferred against the judgment and decreed dated 8-7-1977, passed by Additional District Judge, Almora, in Civil Appeal No. 8 of 1975 (A), dismissing the appeal and confirming the judgment and decree dated

6.3.1975 passed by Munsif Almora in Civil Suit No. 88 of 1974 Smt. Sajahan Begum and others Vs. Safulla and others, whereby the suit was also dismissed.

2- Briefly stated, the facts giving rise to this appeal, are that the plaintiffs/appellants filed a suit for cancellation of the sale deed dated 16-5-1959, executed by late Abdul Rahman in favour of the defendants or for reconveyance of the suit property by issue of mandatory injunction directing the defendants to resale the property in favour of the plaintiffs and in the alternative for the recovery of Rs. 1200/-. According to the plaint case, the father of the plaintiffs Abdul Rahman was in need of money hence he agreed to mortgage the house in suit in favour of defendant Saifulla (since deceased) against a loan of Rs. 1,200/- and executed the sale deed on 16.5.1959. It was also agreed that in case Abdul Rahman or his sons repaid Rs. 1,200/- to the defendants, the latter would reconvey the property to the vendor. Abdul Rahman repaid Rs. 1,200/- on 14-5-1962 and also paid Rs. 426/- as interest to the defendants and also returned the original agreement to defendant. The defendants mutated their names in the revenue and Nagar Mahapalika records during the illness of Abdul Rahman. The defendants were served with a notice dated 8-6-1974 but the defendants did not comply hence the suit was filed.

3. The defendants were served with the notice of the suit, but they did not contest the suit, hence the suit proceeded exparte.

4- Plaintiffs examined Smt. Sajahan Begum as P.W.1 and closed the evidence. Plaintiffs also filed certified copy of registered sale deed and original receipt dated 14-5-1962.

5- The learned Munsif after perusing the material on record and hearing learned counsel for the parties, came to the conclusion that the plaintiff has not produced the original deed of agreement dated 16-5-59 inspite of the order of the court and accordingly the suit was dismissed. It was also held that the plaintiffs are also not entitled to

get Rs. 1200/- on the basis of receipt dated 14.5.62 as the same is time barred.

6- Feeling aggrieved, the plaintiffs preferred appeal before the Additional District Judge, Almora and the appeal was also dismissed by the lower appellate court vide impugned judgment and decree dated 8-7-1977.

7- Against the judgment and order passed by the lower appellate court, the plaintiffs have filed the second appeal before the Allahabad High Court, which has been transferred to this court, after creation of new State.

8- At the time of admission of the appeal, the following substantial question of law was framed:

> "Whether the possession of the appellants with effect from 14th May, 1962 when they paid back the sale consideration would be Adverse and had they acquired title by adverse possession before the institution of the suit?.

9. At the time of hearing of the appeal, it was pointed out by the learned counsel for the parties that some other substantial questions of law are also involved in this case, therefore, in view of the provisions of Section 100 (5) proviso of the C.P.C., I, formulated the following substantial questions of law:-

1- Whether both the courts below misinterpreted and misconstrued the pleadings and consequently the judgments of both the courts below are vitiated in law?.
2- Whether in the wake of the facts of the present case, the trial court should have passed proper order under Order 8 Rule 10 of C.P.C. if so, what?
3- Whether in view of plaintiff/appellants pleadings, the courts below have wrongly drawn the basis of the suit?

10- Heard learned counsel for the parties and perused the record.

11. Record of the case shows that the defendant-respondents did not put any appearance to contest the allegations raised in the plaint. The trial court dismissed the suit of the plaintiff-appellants on the ground that the plaintiff-appellants could not stand on their legs. The lower-appellate court was also of the view that even after the suit was heard exparte, the plaintiff-appellants could not substantiate their case by proper evidence and by producing the basis of the suit or adducing secondary evidence in support of it after proving its loss and non-availability.

12- Perusal of the plaint reveals that the plaintiff-appellants have based their case on the alleged agreement dated 15-5-1959 through which it was agreed that when late Abdul Rahman would repay an amount of Rs. 1200/- to the vendee (Saifula defendant No.1), the sale deed dated 16-5-1959 would be ineffective. It is thus clear that the agreement dated 15-5-59 has been made basis of the suit throughout in the plaint. The record further reveals that the trial court directed the plaintiff-appellants to produce the said agreement as the same is the basis of the suit. On the directions issued by the trial court, the plaintiff-appellants took 10 days time to file the said agreement, but instead of filing the agreement, the plaintiff-appellants produced the receipt dated 14-5-1962. This receipt dated 14.5.1962 cannot be said to be the basis of the suit.

13- Further the paragraph-7 of the plaint indicates that the agreement dated 15-5-1959 was returned to Saifula defendant No.1 on 14.5.1962 when Abdul Rahman paid Rs. 1,200/- to defendant No.1 Saifula. The aforesaid averments made in the plaint appear to be quite unnatural and unreasonable. For the sake of the argument even if it is assumed that the agreement dted. 15.5.59 was returned to the defendant No.1, Saifula, even then it was incumbent upon the plaintiff-appellants to have summoned the original agreement from the defendant-respondents. But it appears to me from the perusal of the record that the plaintiff-appellants have not taken any such steps

before the trial court. As the suit filed by the plaintiff- appellants was for specific performance of the agreement dated 15-5-59 to sell, hence it could not have been decreed either on the basis of the subsequent receipt regarding the payment of Rs. 1,200/- or even on the basis of mere oral evidence of the plaintiff-appellants, unless it was shown that the orginal agreement was lost or could not have been produced even after taking reasonable care. Therefore, in the absence of the basis of the suit, and there being no secondary evidence that it is lost or beyond reach of the plaintiff-appellants, the suit could not have been decreed for its specific performance.

14- Further the statement of Shahjahan Begum, P.W.1, nowhere indicates that the original agreement dated 15-5-1959 was returned to defendant No.1 Saifula at any point of time. Therefore, there is no evidence that the orginal agreement dated 15.5.1959 was actually returned by the plaintiff-appellants' father Abdul Rahman to defendant No.1. Saifula.

15- It is settled law that mere allegations in the plaint do not take place of proof. The receipt dated 14.5.1962 is also absolutely silent about the factum that late Abdul Rahman returned the original agreement to sell dated 15.5.1959 to Saifula defendant No.1.

16. Further the sale deed executed on 16-5-1959, i.e. just a day after the execution of the alleged agreement to sell dated 15.5.1959, does not make ay reference about the agreement to sell even casually.

17- After a careful consideration of the entire material available on record, I come to the conclusion that both the courts below have recorded concurrent finding of facts which cannot be interfered at the stage of second appeal, unless it is shown that the findings are result of misreading the evidence or the material evidence is ignored. The suit for cancellation of the sale deed could not have been decreed for the simple reason that the sale consideration was refunded by the vendor to the vendee and for this reason the sale deed does not get invalid or ineffective. The courts below have also rightly dismissed

the suit for the recovery of an amount of Rs. 1,200/- being barred by time and I do not find any ground to interfere in the findings recorded by the courts below. The substantial question of law formulated by the court at the time of the admission of the appeal, as well as subsequently at the time of the hearing, are answered against the plaintiff-appellants. I do not find anywhere in the judgments passed by the courts below that the pleadings adduced by the plaintiff-appellants before the courts below, have been misinterpreted or misconstrued. Further I am of the view that the judgments and orders passed by the courts below cannot be said improper under Order 8 Rule 10 C.P.C.

18- For the reasons stated above, I do not find any merits in this second appeal and the same is liable to be dismissed.

19- Accordingly the appeal is dismissed. The judgments and decrees passed by both the courts below are hereby confirmed.

20- The interim stay order, if any, stands vacated.

(B.C. Kandpal, J.)

Dated: December 11, 2006.
ISB